UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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AREZOU MANSOURIAN; LAUREN MANCUSO; NANCY NIEN-LI CHIANG; and CHRISTINE WING-SI NG; and all those similarly situated,

Plaintiffs,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA at DAVIS; LAWRENCE "LARRY" VANDERHOEF; GREG WARZECKA; PAM GILL-FISHER; ROBERT FRANKS; and LAWRENCE SWANSON,

Defendants.

NO. CIV. 2-03-02591-FCD-EFB

MEMORANDUM AND ORDER

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This matter is before the court on defendants' motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) filed on June 5, 2007. Plaintiffs oppose defendants' motion. The court heard oral argument on the motion on July 27, 2007 and allowed the parties to submit supplemental briefing addressing new arguments raised at the hearing. Based upon the submissions of the parties and the arguments made by counsel, and for the reasons set forth below, defendants' motion

for judgment on the pleadings is GRANTED in part and DENIED in part.

BACKGROUND[1]

Plaintiffs Arezou Mansourian ("Mansourian"), Lauren Mancuso ("Mancuso"), and Christine Wing-Si Ng ("Ng") (collectively "plaintiffs")[2] are former female wrestlers at the University of California, Davis ("UCD"). (Pls.' Compl. [Docket #1] ("Compl."), filed Dec. 18, 2003, at 5-7.) Plaintiffs filed this action on behalf of themselves and a putative class on December 18, 2003. Plaintiffs named as defendants in their individual and official capacities the following parties: the Regents of the University of California ("UCD"); the Chancellor of the University, Larry Vanderhoef; the Athletic Director at the University, Greg Warzecka; Associate Athletic Directors of the University, Pam Gill-Fisher and Lawrence Swanson; and former Associate Vice Chancellor, Student Affairs, Robert Franks (collectively, the "individual defendants"). (Compl. at 2.)

In the 1990s, varsity wrestling at UCD included both women and men. (Id. at ¶ 82.) Female wrestlers at UCD received high quality coaching, wrestled under women's freestyle rules rather than men's collegiate rules, and received the various benefits of varsity status. (Id. at ¶¶ 82, 85.) Some of UCD's female wrestlers went on to national and international acclaim after having trained at and received the benefits of wrestling at UCD.

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[1] The following facts are primarily derived from plaintiffs' complaint filed December 18, 2003.

[2] Plaintiff Nancy Nien-Li Chiang ("Chiang") voluntarily dismissed all claims in this action on June 12, 2007. (Mem. & Order [Docket #195], filed July 12, 2007).

(Id. at ¶¶ 85-87.)

Plaintiffs participated in high school wrestling and chose to attend UCD because it offered them the opportunity to participate in wrestling while in college. (Compl., ¶¶ 9-11, 24-51.) Mansourian and Ng filled out the NCAA and UCD paperwork necessary for intercollegiate athletics, completed the weight certification requirements for intercollegiate wrestling, and participated in UCD's wrestling program for about 2 years. (Id. at ¶¶ 27-30, 46-50, 55-59.) As varsity wrestlers, plaintiffs received benefits such as medical and athletic training services, laundry services, academic tutoring services, strength and conditioning coaching, wrestling coaching, insurance, access to the weight room, and access to varsity facilities. (Id. at ¶¶ 33, 51, 58.) Mancuso was recruited to wrestle for UCD and awarded an athletic scholarship. (Id. ¶ 39.) She enrolled, filled out the necessary paperwork, and received the required certifications to participate in intercollegiate wrestling. (Id. at ¶¶ 40-42.) Shortly thereafter, however, defendants eliminated women from UCD's wrestling program, and Mancuso was denied her scholarship. (Id. at ¶¶ 59-60.)

During the 2000-2001 academic year, defendants eliminated wrestling athletic participation opportunities for female, but not male, students (the "No Females Directive"). (Id. at ¶¶ 60-62.) Plaintiffs and then-wrestling coach Michael Burch protested this decision. Plaintiffs met with and/or complained to defendants, asserting that the No Females Directive constituted illegal sex discrimination. Defendants ignored the complaints. (Id. at ¶¶ 63-69.) Plaintiffs filed a complaint with the Office

for Civil Rights of the United States Department of Education ("OCR") in the Spring of 2001. (Id. at ¶ 67.) Defendants later agreed to rescind the No Females Directive and to allow women to participate in wrestling. (Id. at ¶ 70-74.)

Plaintiffs, including newcomer Mancuso, enrolled at UCD for the 2001-2002 academic year in reliance upon defendants' promised reinstatement of female wrestling participation opportunities. They filled out their NCAA and UCD eligibility paperwork, completed the weight certification requirements for varsity wrestling, and were deemed eligible. (Id. at ¶ 75.) Unfortunately, plaintiffs returned to a wrestling team with a new coach who did not support women wrestlers and failed to coach them or treat them like the male wrestlers. (Id. at ¶¶ 75-76.) Defendants informed plaintiffs that to participate in wrestling they would have to be part of a mixed gender team and would have to beat the men at their weight class under men's collegiate-style rules, even though the women had previously only participated as part of a women's wrestling program (not a mixed gender team) using international freestyle wrestling rules. (Id. at ¶ 77.) Plaintiffs again complained, but defendants refused and continue to refuse to remedy the situation and to provide women's wrestling opportunities. (Id. at ¶¶ 75-79.) As a result, to date, no women are allowed to participate in UCD wrestling. (Id.)

As a result of defendants' actions, plaintiffs could not attend wrestling practice, could not use the wrestling facilities or weight room, lost their laundry benefits, lost their insurance they received as wrestling athletes, were banned from receiving

instruction from the UCD coaching staff, and were denied athletic training and other medical benefits they received as UCD wrestlers. (Id. at ¶ 61.) Plaintiffs also lost the academic credit associated with UCD wrestling athletes, and were denied early class registration. (Id. at ¶ 62.)

Subsequently, plaintiffs brought this action and alleged six claims for relief: (1) violation of Title IX for failure to provide equal athletic opportunities for women; (2) violation of Title IX for failure to provide equal athletic financial assistance to women; (3) retaliation in violation of Title IX; (4) violation of 42 U.S.C. § 1983 based on the Equal Protection clause of the U.S. Constitution; (5) violation of the California Unruh Civil Rights Act; (6) violation of public policy based upon violations of the California Constitution and the California Education Code. (Id. at 35-53). Defendants filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on March 5, 2004. (Defs.' Mot. to Dismiss [Docket #13-15], filed March 5, 2004.) The court denied the motion on May 6, 2004. (Mem. & Order [Docket #25], filed May 6, 2007.)

Unfortunately, throughout the course of this litigation, both defendants' and plaintiffs' counsel have suffered illnesses. In October 2005, both parties stipulated to an extension of deadlines due to defendants' lead counsel's illness, which made her unavailable to travel to depositions over the following two months. (Stipulation [Docket #57], filed Oct. 28, 2005.) On April 14, 2006, one week before plaintiffs' motion for class certification was to be heard by the court, plaintiffs' counsel filed an ex parte motion to stay and extend scheduling based upon

plaintiffs' counsel's serious health issues. (Ex Parte Mot. to Stay [Docket #117], filed Apr. 14, 2006.) The court granted plaintiffs' motion, and thereafter, on June 6, 2006, the parties stipulated to extend the stay and related scheduling matters. (Order [Docket #125], filed Apr. 18, 2006; Stipulation to Extend Stay and Related Scheduling Matters [Docket #130], filed June 6, 2006.) On July 21, 2006, plaintiffs moved to extend the stay in order to find new counsel because of plaintiffs' counsel's serious medical condition, which the court granted. (Motion to Extend [Docket #134], filed July 21, 2006; Order [Docket #137], filed July 24, 2006.) On August 18, 2006, Monique Oliver filed a notice of appearance on behalf of plaintiffs. (Docket #140, filed Aug. 18, 2006.) On August 23, 2006, and October 19, 2006, the parties stipulated to extend the stay based upon the appearance of new counsel in this matter. (Docket #141, 147.)

On February 2, 2007, plaintiffs filed a motion to amend the complaint to add new plaintiffs, who would also be class representatives, and related allegations. (Pls.' Mot. to Amend [Docket #158], filed Feb. 2, 2007.) The court denied plaintiffs' motion. (Mem. & Order [Docket #175], filed Mar. 20, 2007.) Subsequently, by stipulation of both parties, the class claims in this action were dismissed on June 12, 2007. (Mem. & Order [Docket #195], filed June 12, 2007.) Defendants filed the instant motion on June 5, 2007. (Docket #188.) At oral argument, plaintiffs' counsel conceded that plaintiffs no longer seek injunctive relief. However, plaintiffs do claim that they are entitled to monetary and punitive damages for defendants' denial of educational benefits, lost scholarship money, and the

humiliation, emotional distress, and related harm caused by defendants' sex discrimination. (Id. at 55-56.)

STANDARD

Rule 12(c) of the Federal Rules of Civil Procedure provides, in relevant part, that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." Fed. R. Civ. Proc. 12(c). Moreover, Rule 12(h)(2) of the Federal Rules of Civil Procedure provides in relevant part that a defense of failure to state a claim upon which relief can be granted, may be made by motion for judgment on the pleadings. Fed. R. Civ. Proc. 12(h).

When considering a motion for judgment on the pleadings presenting a defense of failure to state a claim upon which relief can be granted, a court should employ those standards normally applicable to a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd., 132 F.3d 526, 528-29 (9th Cir. 1997); 5B Wright & Miller, Federal Practice and Procedure, Civil § 1368 at 515-16 (3d ed. 2007). On a motion to dismiss, the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See id.

Nevertheless, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986).

Ultimately, the court may not dismiss a complaint in which the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1974 (2007). Only where a plaintiff has not "nudged [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. Id. "[A] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (quoting Hudson v. King & Spalding, 467 U.S. 69, 73 (1984)).

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. See Mir v. Little Co. Of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998).

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ANALYSIS

I. Title IX

Alleged violations of Title IX in the area of athletics are typically divided into claims of either equal treatment or effective accommodation. Pederson v. Louisiana State Univ., 213 F.3d 858, 865 n.4 (5th Cir. 2000). This division arises from regulations promulgated by Title IX. Id. Claims under an equal treatment theory "derive from the Title IX regulations found at 34 C.F.R. §§ 106.37(c) 106.41(c)(2)-(10), which call for equal provision of [] athletic benefits and opportunities among the sexes." Boucher v. Syracuse Univ., 164 F.3d 113, 115 n.2 (2d Cir. 1999). Claims brought under an effective accommodation theory stem from the implementing regulations that provide:

> in determining whether equal athletic opportunities for members of both sexes are available, the Office of Civil Rights of the Department of Education (the office charged with enforcement of Title IX) will consider, among other factors, "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."

Pederson, 213 F.3d at 865 n.4 (citing Boucher, 164 F.3d at 115 n.1; 34 C.F.R. § 106.41(c)(1)).

As clarified by both arguments made at hearing and the supplemental submissions of the parties, plaintiffs are asserting claims against defendant UCD under both an unequal treatment theory and an ineffective accommodation theory. Defendant UCD moves for judgment on the pleadings as to both theories.

A. Unequal Treatment Claims

Pursuant to an "unequal treatment" theory, plaintiffs seek damages arising out of the No Females Directive issued in the fall of 2000; an alleged broken promise in June 2001 to reinstate

the female wrestling program at UCD; the failure to renew the contract of their wrestling coach; and requiring females to compete for membership on the UCD wrestling team under the same terms and conditions as male athletes in the fall of 2001. Plaintiffs contend that these were discriminatory acts made by defendant pursuant to a "policy and practice" of discrimination, and as such, these allegations establish a "continuing violation" of federal law. (Pl.'s Opp'n, filed July 13, 2007, at 5.) Conversely, defendant asserts that plaintiffs merely allege a series of discrete acts. (Def.'s Reply to Pl.'s Opp'n ("Reply"), filed July 20, 2007, at 4-6.) According to defendant UCD, the last discrete act occurred on October 16, 2001 with the resolution of plaintiffs' OCR complaint, and thus, plaintiffs' claims tolled in October 2002. Id. at 5.

1. Discrete Acts

"A discrete retaliatory or discriminatory act 'occurred' on the day that it happened." National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 110 (2002). Where a discrete act is the basis for a discrimination claim, the timely filing period begins to run from that date. Id. Such acts "are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Id. at 113.

In Morgan, the Supreme Court found that, with regard to the applicability of the continuing violation doctrine, the term "practice" does not convert related discrete acts into a single unlawful practice for the purposes of timely filing. 536 U.S. 101, 111 (2002). The Court defined a "discrete act" of discrimination as one that constitutes a separate, actionable

unlawful employment practice that is temporally distinct. Id. at 114. In the employment context, the Court pointed to "termination, failure to promote, denial of transfer, [and] refusal to hire" as examples of such discrete acts. Id. The Court held that the cause of action accrued when the discrete, unlawful action occurred, and that "a new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." See Ledbetter v. Goodyear Tire & Rubber Co., Inc., 127 S. Ct. 2162, 2169 (2007) (discussing the Court's holding in Morgan and other related cases).

Subsequently, the Supreme Court has reiterated that the current effects of discriminatory conduct "cannot breathe life into [that] prior, uncharged conduct." Id. In Ledbetter, a female retiree sued her former employer under Title VII and the Equal Pay Act for alleged sex discrimination reflected in negative evaluations, which resulted in her receiving lower paychecks than her male counterparts. Id. at 2163-64. The plaintiff argued that each of the paychecks she received constituted a new, actionable discriminatory act. Id. at 2169. The Court rejected this argument, holding that the actionable discrete conduct occurred when the pay decision was made, not when a paycheck was issued pursuant to that allegedly discriminatory decision. Id. at 2175-76.

In this case, the heart of plaintiffs' Title IX claims based upon an unequal treatment theory stems from discrete acts taken against three women wrestlers over roughly a year's time.

Plaintiffs claim that defendant UCD first blatantly excluded them from the wrestling program and then failed to give them a fair opportunity to obtain a position on the team by requiring them to compete against men, using men's rules. These claims are akin to a claim of termination and failure to hire or promote in the employment context. As such, they are appropriately characterized as discrete acts. Plaintiffs further claim that the discriminatory acts continued because they were unable to wrestle each and every day that they were students at UCD. However, this inability was merely the *effect* of defendant's prior, allegedly discriminatory conduct. As set forth in Ledbetter, the current effects of discriminatory conduct "cannot breathe life into [that] prior, uncharged conduct." 127 S. Ct. at 2169.

The rationale applied by the Ninth Circuit in Cherosky v. Henderson is similarly applicable to this case. 330 F.3d 1243 (9th Cir. 2003). In Cherosky, current and former employees brought suit against the United States Postal Service under the Americans with Disabilities Act, challenging the denial of their requests to wear respirators while on duty. Id. at 1244-45. The Ninth Circuit found that the heart of the plaintiffs' complaint stemmed from the individualized decisions to deny the plaintiffs' requests and, as such, were discrete acts. Id. at 1247. Similarly, in this case, the gravamen of plaintiffs' complaint stems from individualized decisions by defendant regarding the UCD wrestling program, which affected each individual plaintiff. As such, these decisions are discrete acts.

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Plaintiffs contend that the reasoning of Morgan, Ledbetter, and Cherosky does not apply in this case because each of those cases arose out of an employment relationship between the plaintiffs and the defendants. (Pls.' Supp. Mem., filed Aug. 10, 2007, at 7-9.) The crux of plaintiffs' argument is that because Title VII claims arise in the employment context, the Supreme Court's holdings in Morgan and Ledbetter should not control the analysis of plaintiffs' Title IX unequal treatment claims.[3]

Plaintiffs' argument is unpersuasive. Title VII and Title IX are sufficiently analogous that the "discrete discriminatory acts" analysis prescribed in Morgan applies to the unequal treatment claims brought by plaintiffs in this case. Both Title VII and Title IX address sex discrimination, and the legislature has emphasized the close relationship between the two. Specifically, the House Report on Title IX explicitly referenced the relationship between Title VII and Title IX:

> Title VII . . . specifically excludes educational institutions from its terms. [Title IX] would remove that exemption and bring those in education under the equal employment provision.

Education Amendments Act of 1972, Pub. L. No. 92-318, 1972

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[3] Plaintiffs, citing Gebser v. Lago Vista Indep. School Dist., assert that under Title IX, courts "have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." 524 U.S. 274, 284 (1998). This motion does not raise issues regarding remedies, and thus, plaintiffs' reliance on Gebser in this context is misplaced. While Gebser demonstrates the "manifest" difference between Title VII and Title IX in terms of available remedies, the Court's analysis in Gebser did not address the analytical framework for assessing a Title IX claim on the merits. Id.

U.S.C.C.A.N. (86 Stat. 253) 2462, 2512.[4] The purposes that Titles VII and Title IX are both intended to serve, eliminating discrimination and providing protection against it, suggest that Title VII's analytical framework with respect to discrete acts should be applied to a Title IX claim for sex discrimination. See Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311, 316 n. 6 (10th Cir. 1987) ("Because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination, we regard it as the most appropriate analogue when defining Title IX's substantive standards . . . ."), cert. denied, 484 U.S. 849 (1987); see also Patricia H. v. Berkeley Unified School Dist., 830 F. Supp. 1288, 1293 (N.D. Cal. 1993) ("As the Supreme Court acknowledged in [Franklin], a student should have the same protection in school that an employee has in the workplace.").

Further, the Ninth Circuit's decision in Cherosky reinforces the conclusion that the Morgan Court's significant restriction of the continuing violations doctrine applies outside the Title VII context.[5] 330 F.3d at 1246. "Although Morgan involved Title VII of the Civil Rights Act of 1964, the Supreme Court's analysis of the continuing violations doctrine is not limited to Title VII actions. *It applies with equal force* to the Rehabilitation Act and *to actions arising under other civil rights laws*." Id.

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[4] On the day Title IX was enacted, Senator Bayh stated, "this amendment [applies] Title VII's widely recognized standards of equality of employment opportunity to educational institutions." 118 Cong. Rec. 5807 (1972).

[5] In restricting the continuing violations doctrine, the Court applied the "discrete discriminatory acts" analysis. Morgan, 536 U.S. at 122.

(emphasis added); see e.g., RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045 (9th Cir. 2002) (applying Morgan's rationale in an action brought pursuant to 42 U.S.C. § 1983); Kaster v. Safeco Ins. Co. of Am., 212 F. Supp. 1264 (D. Kan. 2002) (applying Morgan's rationale to the Age Discrimination in Employment Act).

Therefore, plaintiffs' claims under the unequal treatment theory arise out of a series of discrete acts and do not arise out of a continuing violation of federal law.

2. Pattern and Practice

Alternatively, plaintiffs argue that the Court's holding in Morgan does not apply to their case because they are alleging a pattern or practice theory of the type explicitly excluded from the Court's analysis and opinion in Morgan. 536 U.S. at 115 n.9. Defendant contends that, while evidence of such a claim can support an individual's claim of discrimination, the pattern or practice method of proof cannot apply to a private, non-class cause of action. Whether individual plaintiffs can rely on a pattern or practice method of proof is an issue that has not been addressed by the Ninth Circuit.

"A pattern or practice case is not a separate and free-standing cause of action, . . . but is really 'merely another method by which disparate treatment can be shown." Celestine v. Petroleos de Venezuela SA, 266 F.3d 343, 355 (5th Cir. 2001) (citing Mooney v. Aramco Servs. Co., 54 F.3d 1207, 1219 (5th Cir. 1995). Specifically, a pattern or practice theory of discrimination carries with it a different method of proof than an individual claim of discrimination. See Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 334-40; Lowery v.

Circuit City Stores, Inc., 158 F.3d 742, 759 (1998) (overruled on other grounds). In these cases, typically, the government (either through the EEOC or the Attorney General) or a plaintiff class charges systematic discrimination against a protected group. Lowery, 158 F.3d at 759; see Bacon v. Honda of Am. Mfg., Inc., 370 F.3d 565, 575 (6th Cir. 2004); Celestine, 266 F.3d at 355 (5th Cir. 2001). The plaintiff bears the initial burden of demonstrating a prima facie case by a preponderance of the evidence that the defendant's standard operating procedure included discriminatory practices. Teamsters, 431 U.S. at 336. "At this initial 'liability' stage, the [plaintiff] is not required to prove that any particular employee was a victim of the pattern or practice; it need only establish a *prima facie* case that such a policy existed." Lowery, 158 F.3d at 760 (citing Teamsters, 431 U.S. at 360). Once such a prima facie case is established, the burden shifts to the defendant to demonstrate that the plaintiff's showing is either inaccurate or insignificant. Id. If the defendant fails to rebut the plaintiff's case "the resulting finding of a discriminatory pattern or practice gives rise to an inference that all employees subject to the policy were its victims and are entitled to appropriate remedies." Id. at 759 (citing Teamsters, 431 U.S. at 362). Such a finding justifies an award of prospective relief, but if individual relief is sought, the plaintiff must demonstrate that the individual employees were actual victims of the policy. Id.

Although plaintiffs no longer assert class claims or seek prospective injunctive relief, they assert that they may still

press a pattern or practice theory of relief. "The Supreme Court has never applied the Teamsters method of proof in a private, non-class suit." Id. at 761. "Rather, the Court has noted that there is a 'manifest' and 'crucial' difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination." Id. (quoting Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 867, 876 (1984). Where the government or plaintiff class must first litigate the common question of whether there was a discriminatory policy, individual plaintiffs must litigate "the discrete question of whether the employer discriminated against that plaintiff in a specific instance." Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

Pattern or practice class-action suits also differ from individual, private discrimination suits because of the "nature of remedies." Id. Pattern or practice class-action suits typically seek to cure systemic discrimination and the harm suffered by the group subjected to that discrimination. Id. Therefore, plaintiffs typically seek injunctions for broad relief, and the "need for such remedies can be determined without referring to matters such as the qualifications of a particular employee." Id. Conversely, in an individual discrimination case, the plaintiff generally seeks damages specific to the individualized harm inflicted upon him, such as reinstatement, hiring, back-pay, or damages. Id. "Such remedies typically require the examination of the circumstances surrounding a single employment action involving the plaintiff." Id.

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Because a pattern or practice theory of recovery is focused on establishing a policy of discrimination and not on individual decisions affecting specific plaintiffs, "it is inappropriate as a vehicle for proving discrimination in an individual case." Bacon, 370 F.3d at 575; see Celestine, 266 F.3d at 356 (holding that the pattern and practice method of proof was inapplicable to an individual claim of discrimination "given the nature and purpose of the pattern and practice method of proof"). Therefore, the court holds that the pattern or practice method of proof set forth in Teamsters and excluded from the Court's analysis in Morgan is not available to individual plaintiffs. As such, plaintiffs' claims based upon unequal treatment that stem from discrete acts by defendant UCD are not exempt from the timely filing analysis set forth in Morgan and Ledbetter.

3. Applicable Statute of Limitations

Defendant UCD moves for judgement on the pleadings as to plaintiffs' Title IX unequal treatment claims on the basis that they are barred by the statute of limitations. Title IX, 20 U.S.C. § 1681 et seq., does not specify a limitations period. When Congress fails to specify a statute of limitations for a federal claim for relief, courts must apply the most closely analogous statute of limitations under state law. Reed v. United Transp. Union, 488 U.S. 319, 323 (1989). The Ninth Circuit has not considered the issue under Title IX; however, the other federal appellate courts that have considered the issue are in accord that a Title IX claim is most closely analogous to a common law action for personal injury. Doe v. Howe Military School, 227 F.3d 981, 987 (7th Cir. 2000); M.H.D. v. Westminster

Schools, 172 F.3d 797, 803 (11th Cir. 1999); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 729 (6th Cir. 1996); Egerdahl v. Hibbing Community College, 72 F.3d 615, 618 (8th Cir. 1995); Bougher v. University of Pittsburgh, 882 F.2d 74, 77-78 (3d Cir. 1989). Moreover, in Taylor v. Regents of the University of California, 993 F.2d 710, 712 (9th Cir. 1993), the Ninth Circuit came to the same conclusion with respect to a Title VI claim. In light of this authority, and the fact that Title IX is to be construed consistently with Title VI,[6] the court applies California's statute of limitations for personal injury actions to plaintiffs' Title IX claims.[7]

In California, an aggrieved party must commence an action for personal injury caused by an alleged wrongful act or neglect within two years of the act. Cal. Code Civ. Proc. § 335.1. The two-year limitations period is a fairly recent development. Before 2003, the limitations period for personal injury claims was one year. Cal. Code Civ. Proc. § 340(3), repealed. Section 335.1 became effective January 1, 2003. This amendment impacts this case, which was filed December 18, 2003.

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[6] Since Title IX has identical statutory language to Title VI, except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, the Supreme Court has interpreted both statutes interchangeably. Cannon v. University of Chicago, 441 U.S. 677, 694-99 (1979).

[7] Plaintiffs' argument to the contrary, based on one Northern District of California decision, is unavailing. Kramer v. Regents of the University of California, 81 F. Supp. 2d 972 (N.D. Cal. 1999) (applying California's three-year statute of limitations for actions "upon a liability created by statute" to ADA and Rehabilitation Act claims). In the Title IX context, it is contrary to the weight of the authority described above, most particularly Taylor.

A legislative extension of the statute of limitations period will extend the limitations period of an actionable claim if the extension occurs *before* the claim for relief becomes time barred under the old limitations period. Douglas Aircraft Co. v. Cranston, 58 Cal. 2d 462, 465 (1962). On the other hand, once a claim is time barred it will not be revived by the extension to the applicable limitations period unless the legislature expressly declared that the amendment of the limitations period applied retroactively. Bartman v. Estate of Bartman, 83 Cal. App. 3d 780, 787-78 (1978). Such an expression of retroactivity was made here only for victims of the terrorist attacks of September 11. Cal. Code Civ. Proc. § 340.10(b).

Plaintiffs' first claim for relief alleges that defendant UCD violated Title IX by failing to provide equal athletic opportunities. Specifically, plaintiffs allege that defendant (1) chooses "to make fewer athletic participation opportunities to female students than to male students;" and (2) intentionally discriminates against female students by only providing male students with the opportunity to wrestle and by issuing the No Females Directive. (Compl. ¶¶ 129-30). Viewing the complaint in the light most favorable to plaintiffs, their first claim for relief alleges both (1) an ineffective accommodation theory; and (2) an unequal treatment theory under Title IX. As set forth above, plaintiffs' unequal treatment claims stem from discrete discriminatory acts by defendant. The last discrete discriminatory act alleged by plaintiffs occurred, at the latest,

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in October 2001, when their OCR complaint was resolved.[8] The statute of limitations then in effect was one year, and thus, plaintiffs' claims were required to be filed no later than the Fall of 2002. Therefore, plaintiffs' first claim for relief for unequal treatment is barred by the statute of limitations, and defendant UCD's motion with respect to this claim is GRANTED.[9]

Plaintiffs' second claim for relief alleges that defendant UCD violated Title IX by failing to provide equal athletic financial assistance by offering athletic scholarship funding to male students and by intentionally discriminating against female students by choosing to make less athletic financial assistance available. In order to allege a claim under Title IX with respect to scholarships, the plaintiff must be a member of a varsity team. See Pederson, 213 F.3d at 872 (finding that "[s]tanding to challenge effective accommodation does not automatically translate into standing to challenge the treatment of existing varsity athletes" with respect to claims for unequal treatment in scholarship opportunities). At the latest, plaintiffs were members of the varsity team in the Fall of 2001. The statute of limitations then in effect was one year, and thus, plaintiffs' claims were required to be filed no later than the Fall of 2002. Therefore, plaintiffs' second claim for relief for

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[8] Here, the existence of plaintiffs' OCR complaints may be judicially noticed by this court. See e.g., Pavone v. Citicorp Credit Services, 60 F. Supp. 2d 1040, 1045 (S.D. Cal. 1997). The truth of the allegations contained therein, however, is not subject to judicial notice. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 427 (3d Cir. 1999).

[9] The court addresses the viability of plaintiffs' ineffective accommodation claims, *infra*.

unequal treatment is barred by the statute of limitations, and defendant UCD's motion with respect to this claim is GRANTED.

Plaintiffs' third claim for relief alleges that defendant UCD retaliated against plaintiffs. Specifically, plaintiffs allege four "retaliatory" acts, the last of which occurred in the Fall of 2001: (1) defendant instituted the No Females Directive in the Fall of 2000; (2) defendant reneged on the promise to remedy the No Females Directive in the Fall of 2001; (3) defendant did not renew Michael Burch's contract in mid-2001; and (4) defendant allowed the female wrestlers a chance to wrestle against the male wrestlers for a position on the men's wrestling team in the Fall of 2001.[10] Again, the statute of limitations then in effect was one year, and thus, plaintiffs' claims were required to be filed no later than the Fall of 2002. Therefore, plaintiffs' third claim for relief for retaliation is barred by the statute of limitations, and defendant UCD's motion with respect to this claim is GRANTED.[11]

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[10] Again, plaintiffs allege that this retaliation resulted in a policy of discrimination. (Compl. ¶ 150). As set forth above, however, the heart of plaintiffs' complaint relates to these discrete acts against the individual plaintiffs. (Compl. ¶¶ 151-57). Plaintiffs have cited no authority for the proposition that an ineffective accommodation claim can be raised through a retaliation claim.

[11] Plaintiffs argue that this court should follow the rationale in its prior Memorandum and Order, filed May 6, 2004, which found that plaintiffs' claims, as alleged, were timely and which directed the parties to further brief the statute of limitations issues on a motion for summary judgment. Since that order, there have been substantial changes in this litigation, namely the dismissal of class allegations. Moreover, the parties' arguments and submissions have further clarified the legal theories advanced by plaintiffs. The court's prior order reflected its analysis of plaintiffs' ineffective accommodation claim, as set forth infra. The court did not specifically

(continued...)

B. Ineffective Accommodation

In their first claim for relief, plaintiffs allege that defendant UCD violated Title IX by "choosing to make fewer athletic participation opportunities to female students than to male students." (Compl. ¶ 129). The court construes that by this allegation, plaintiffs are alleging an ineffective accommodation claim. Defendant argues that plaintiffs' ineffective accommodation claim should be dismissed because plaintiffs (1) alleged insufficient facts to support standing for an ineffective accommodation claim; (2) failed to give s notice of their claims; and (3) cannot assert a claim for damages based specifically upon the lack of opportunity to wrestle.[12]

1. Standing

Defendant UCD contends that plaintiffs have not alleged sufficient facts to set forth an ineffective accommodation claim. Specifically, defendant contends that (1) plaintiffs failed to allege that there was sufficient interest and ability among females at UCD to field a women's wrestling team; (2) plaintiffs have failed to allege that there was a reasonable expectation of intercollegiate competition in women's wrestling; and (3) plaintiffs were allowed to try out for the wrestling team on an equal basis with male students.

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[11](...continued)
address plaintiffs' unequal treatment claims. However, to the extent that this order is inconsistent with the court's Memorandum and Order, filed May 6, 2004, the court reconsiders that Order. Fed. R. Civ. Proc. 54(b).

[12] Defendant does not argue that plaintiffs' ineffective accommodation claims are barred by the statute of limitations.

The allegations in the complaint adequately demonstrate that there was sufficient interest and ability among females at UCD to field a team. The complaint contains allegations that in the early 1990s UCD began providing wrestling opportunities to female students, including a women's division in the university's annual "Aggie Open" wrestling tournament. Some of UCD's female wrestlers went on to national and international acclaim after having trained at and received the benefits of wrestling at UCD. Plaintiffs chose to attend UCD because of that history and because of the promise of opportunities to participate in wrestling at UCD. Mansourian, Chiang, and Ng filled out the NCAA and UCD paperwork necessary for intercollegiate athletics, completed the weight certification requirements for intercollegiate wrestling, and participated in UCD's wrestling program for about 2 years. Mancuso similarly fulfilled the NCAA and UCD requirements and attended UCD in order to wrestle. Plaintiffs also allege that there are nearly 1,000 female students who participate in wrestling at California high schools, and there are other female students who participate in wrestling at California community colleges. As such, viewing the allegations in the light most favorable to plaintiffs and drawing all reasonable inferences therefrom, plaintiffs allege that they were able and ready to wrestle at UCD and that sufficient interest existed in the female student population at UCD to field a women's wrestling team.

With respect to defendant's assertion that plaintiffs have failed to allege with particularity that there is a reasonable expectation of intercollegiate competition, defendant asks this

court to impose too heavy a burden on plaintiffs at this stage in the litigation. On a motion challenging the sufficiency of the pleadings, plaintiffs are not required to plead specific facts establishing a prima facie case of ineffective accommodation. Swierkiewicz, 534 U.S. at 510-11. Rather, all that is required is a plain statement of the facts sufficient to give the defendant notice of the claims against it. Id. at 514. In Swierkiewicz, the Court of Appeals had affirmed the district court's dismissal of a case brought by an employee against his former employer under Title VII and the ADEA because the plaintiff failed to allege the elements of a prima facie case of discrimination in his complaint. Id. at 509-10. The Supreme Court reversed the dismissal, holding that pursuant to Federal Rule of Civil Procedure 8(a), a complaint requires only a "short and plain statement of the claim showing that the pleader is entitled to relief" in order to survive a motion to dismiss. Id. at 510-11. The Court rejected applying a heightened pleading standard to discrimination claims. Id. at 511. Even if plaintiffs have not specifically alleged a reasonable expectation of intercollegiate competition, plaintiffs have complied with Rule 8(a) and given sufficient notice to defendant of the basis for their claims. Therefore, defendant's motion to dismiss on this basis is without merit.

Finally, defendant contends that plaintiffs do not have standing to bring an ineffective accommodation claim because they allege that they were able to compete with men on an equal basis for a position on the wrestling team. However, the crux of plaintiffs' claim is that this accommodation was not effective

because they were forced to compete in a contact sport against men using men's rules. At this stage in the litigation, viewing the allegations in the light most favorable to the plaintiffs, the court cannot find as a matter of law that defendant's proffered opportunity constituted an effective accommodation.

Therefore, defendant's motion for judgment on the pleadings with respect to plaintiffs' ineffective accommodation claim on the grounds that plaintiffs lack standing to sue is DENIED.

2. Notice

Defendant UCD asserts that plaintiffs' ineffective accommodation claim must fail because plaintiffs "have not alleged that they gave defendant notice or opportunity to remedy any purported systemic non-compliance with Title IX." (Defs.' Reply to Pls.' Supp. Brief. at 5, filed August 17, 2007.) Defendant cites Grandson v. Univ. of Minn., 272 F.3d 568 (8th Cir. 2001), in support of their assertion. Id. In Grandson, the Eighth Circuit affirmed dismissal of similar damage claims without leave to amend because the complaint made "no allegation of prior notice of their complaints to appropriate UMD officials, no allegation of deliberate indifference by such officials, and no allegation they had afforded UMD a reasonable opportunity to rectify the alleged violations." Grandson, 272 F.3d at 575.

Plaintiffs allege that they filed a complaint with the OCR in the Spring of 2001. (Id. at ¶ 67.) Contrary to defendant's assertions, under the Rule 12(b)(6) standard, this allegation reasonably supports the inference that plaintiffs did provide notice to defendant of their ineffective accommodation claim.

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Defendant requests that the court take judicial notice of letters and reports from the OCR relating to plaintiffs' complaints. Rule 201 permits a court to take judicial notice of an adjudicative fact "not subject to reasonable dispute," in that the fact is either "(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The court can take judicial notice of matters of public record, such as pleadings in another action and records and reports of administrative bodies. Emrich v. Touche Ross & Co., 846 F.2d 1190, 1198 (9th Cir. 1988). Here, the existence of plaintiffs' OCR complaints may be judicially noticed by this court. See e.g., Pavone v. Citicorp Credit Services, 60 F. Supp. 2d 1040, 1045 (S.D. Cal. 1997). The truth of the allegations contained therein, however, is not subject to judicial notice. See Southern Cross Overseas Agencies, Inc. v. Wah Kwong Shipping Group Ltd., 181 F.3d 410, 427 (3d Cir. 1999). Because the court cannot take judicial notice of the content of the OCR documents, the court cannot determine whether plaintiffs provided defendant with notice of their OCR complaint. Moreover, none of the proffered documents includes plaintiffs' complaint to the OCR; rather, the only relevant documents contain the OCR's characterizations and descriptions of plaintiffs' complaint. The accuracy of the OCR's conclusions is a factual dispute that must be resolved on summary judgment or at trial.

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Therefore, defendant's motion for judgment on the pleadings on the basis that plaintiffs provided insufficient notice of their ineffective accommodation claim is DENIED.[13]

3. Damages

Finally, defendant argues that plaintiffs' ineffective accommodation claim must fail because the damages they seek are too speculative. (Defs.' Reply at 5-7, filed August 17, 2001.) Specifically, defendant argues that plaintiffs cannot assume that they would have been able to wrestle at UCD if it had been in compliance with Title IX.

This case is analogous to the Fifth Circuit's decision in Pederson, 213 F.3d 858, where the court found that plaintiffs, female soccer players, had standing to sue for damages under an ineffective accommodation theory. In Pederson, the plaintiffs alleged that Louisiana State University discriminated against females by ineffectively accommodating female students in the provision of teams and facilities for intercollegiate competition. 213 F.3d at 863. The court held that under an ineffective accommodation theory, the injuries to a plaintiff "resulted from the imposed barrier – the absence of a varsity team for a position on which a female student should be allowed to try out." Id. at 871. Therefore, so long as a plaintiff alleged that she was willing and able to compete for a position on that team, the injury and resulting damages were not unduly

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[13] For the purposes of this motion and because plaintiffs have made sufficient allegations with respect to defendant's argument, the court assumes, without deciding, that Title IX requires that a plaintiff give a defendant notice and an opportunity to respond.

speculative such that plaintiffs' claims should be dismissed on the pleading. Moreover, the court held that to the extent "LSU violated the individual rights of the plaintiffs by failing to accommodate effectively the interests and abilities of female students" and to the extent such violations caused actual damages, the plaintiffs were entitled to be compensated for those damages. Id. at 875.

In this case, viewing the allegations in the light most favorable to plaintiffs and drawing all reasonable inferences therefrom, plaintiffs allege that they suffered actual damages because of the absence of a varsity team, specifically a wrestling team, for a position on which a female student should be allowed to compete. Therefore, based upon the rationale of the Fifth Circuit in Pederson, plaintiffs' claim for damages are not unduly speculative.

Defendant relies primarily on National Wrestling Coaches Association v. Department of Education, 366 F.3d 930 (D.C. Cir. 2004), in support of its assertion that plaintiffs' claim must fail because damages are too speculative. However, the facts in National Wrestling Coaches are distinguishable from the facts in this case. In National Wrestling Coaches, the plaintiffs represented athletics organizations that supported college wrestling. Id. at 933. These organizations asked the court to declare Title IX's three-part test invalid because it allegedly encouraged universities to cut male wrestling programs. Id. at 936-37. The court reasoned that "[e]ven if the court invalidated the department's three-part test, schools might nevertheless continue to eliminate or cap men's wrestling teams in order to

comply with Title IX or the 1975 regulations or for some other unrelated reason. Save for their speculation about 'better odds,' appellants would be no better off than they are under the department's current policies." Id. at 944. Therefore, the court found that plaintiffs lacked standing because they failed to show that their alleged injury could be redressed by invalidating the challenged policy. Id.

Conversely, in this case, plaintiffs seek monetary and punitive damages for injury resulting from lost opportunities while they were students at UCD. Plaintiffs allege actual injury, including lost educational opportunities, increased education expenses, and emotional distress, all arising from defendant's alleged violations of Title IX. As such, plaintiffs have sufficiently demonstrated that the monetary relief sought in this case would sufficiently redress their alleged injury. Therefore, defendant's reliance on National Wrestling Coaches is misplaced.

Thus, defendant's motion for judgment on the pleadings regarding plaintiffs' ineffective accommodation claim based upon an unduly speculative claim for damages is DENIED.

C. Punitive Damages

Defendant UCD argues that plaintiffs' claims for punitive damages under Title IX must be dismissed because they are not permitted under federal law. In discussing the available remedies under Title IX and by comparison, Title VI, the Supreme Court has found that "[a] funding recipient is generally on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies

traditionally available in suits for breach of contract." Barnes v. Gorman, 536 U.S. 181, 187 (2002) (citing Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992)). The Court has also noted that "punitive damages, unlike compensatory damages and injunction, are generally not available for breach of contract." Id. (citations omitted). Therefore, the Court has held that "Title VI funding recipients have not, merely by accepting funds, implicitly consented to liability for punitive damages." Id. at 188. It is well established that Title IX is modeled after Title VI and is interpreted and applied in the same manner. See id. at 185; see also Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998). As such, because the Supreme Court has found that punitive damages may not be awarded in private suits under Title VI, it follows that they may not be awarded in private suits under Title IX. See id. at 185-90; see also Mercer v. Duke Univ., 401 F.3d 199, 202 (4th Cir. 2005) (stating that punitive damages are not available under Title IX); Frechel-Rodriguez v. Puerto Rico Dept. of Educ., 478 F. Supp. 2d 191, 198-99 (D.P.R. 2007) (same); Hooper v. North Carolina, 379 F. Supp. 2d 804, 811 (M.D.N.C. 2005) (same); Alston v. North Carolina A & T Univ., 304 F. Supp. 2d 774, 784 (M.D.N.C. 2004) (same). Moreover, this conclusion is supported by the Supreme Court's "traditional presumption against imposition of punitive damages on government entities." Vermont Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 784-85 (2000); Newport v. Fact Concerts, Inc., 453 U.S. 247, 262-63 (1981).

Plaintiffs contend that punitive damages are not unavailable for Title IX claims as a matter of law. However, plaintiffs

wholly fail to address the Supreme Court's analysis in Barnes. The only cases cited by plaintiffs in support of their position are cases that pre-date the Court's decision in Barnes by at least five years. Such sparse analysis is unpersuasive in light of the Supreme Court's ruling in Barnes and the decisions of subsequent courts that have addressed this issue.[14]

Therefore, defendant's motion for judgment on the pleadings regarding plaintiffs' claims for punitive damages under Title IX is GRANTED.

D. Emotional Distress Damages

Defendant UCD also argues that plaintiffs' claims for emotional distress damages under Title IX must be dismissed because they are not permitted under federal law. Specifically, defendant contends that relief under Title IX is limited to the forms of relief traditionally available in suits for breach of contract and that, absent extreme circumstances, emotional distress damages are not normally recoverable in contract claims. However, defendant fails to cite any case law to support its position that emotional distress damages are not recoverable in an ineffective accommodation claim under Title IX. Rather, defendant acknowledges that the Supreme Court has implicitly approved of damages claims for emotional distress in sexual harassment claims brought pursuant to Title IX. Davis v. Monroe

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[14] Plaintiffs also contend that it is improper for this court to consider the viability of remedies on a motion for judgment on the pleadings. This contention is without merit. The treatise cited by plaintiffs in support of their argument does not support their assertion. Further, partial judgment on the pleadings serves to expedite the litigation and narrow the claims for discovery and trial.

County Bd. of Educ., 526 U.S. 629 (1999); Gebser, 524 U.S. 274; Franklin, 503 U.S. 60. Defendant simply argues that those cases are inapplicable because the alleged breach of a duty to provide equal accommodation in athletic programs is not sufficiently severe to justify the award of emotional damages.

At this stage in the litigation, in the absence of any authority on point, the court cannot find as a matter of law that plaintiffs are not entitled to emotional distress damages. Therefore, defendant's motion for judgment on the pleadings regarding plaintiffs' claims for emotional distress damages is DENIED.

II. 42 U.S.C. § 1983

Plaintiffs bring claims under 42 U.S.C. § 1983 against the individual defendants for monetary damages based upon alleged violations of the Equal Protection Clause.[15] Defendants argue that plaintiffs' § 1983 claim must be dismissed because it is subsumed by Title IX. Alternatively, plaintiffs claim that their section 1983 claim can coexist with their Title IX claims.

There is presently a split in circuit authority as to whether Title IX subsumes a claim under § 1983. Compare Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749, 758 (2d Cir. 1998) ("[A] § 1983 claim based on the Equal Protection Clause is subsumed by Title IX), and Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862 (7th Cir. 1996) (holding that a plaintiff may not

[15] Plaintiffs brought this claim against defendant UCD for injunctive relief only and against the individual defendants for all available remedies. Because plaintiffs conceded that they are no longer seeking injunctive relief, plaintiffs' § 1983 claims against defendant UCD are DISMISSED.

claim that a single set of facts leads to causes of action under both Title IX and section 1983), and Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779, 789 (3d Cir. 1990) (same), and Travis v. Folsom Cordova Unified Sch. Dist., 2007 U.S. Dist. LEXIS 11566 (E.D. Cal. 2007) (holding that "Title VI is sufficiently comprehensive to evince congressional intent to foreclose a § 1983 remedy"), with Crawford v. Davis, 109 F.3d 1281, 1284 (8th Cir. 1987) (holding that Title IX has no preemptive power over section 1983 claims), and Seamons v. Snow, 84 F.3d 1226, 1233 (10th Cir. 1996) (holding that plaintiff has independent rights under Title IX and under § 1983), and Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 722-23 (6th Cir. 1996) (holding that a § 1983 claim seeks to enforce distinct and independent substantive due process rights).

Section 1983 does not create substantive rights, but provides the procedural framework for a plaintiff to bring suit for violations of federal rights. "Section 1983 supplies a cause of action to a plaintiff when a person acting under the color of state law deprives that plaintiff of any 'rights, privileges, or immunities secured by the Constitution and laws of the United States.'" Bruneau, 163 F.3d at 756 (citing 42 U.S.C. § 1983). However, § 1983 does not provide a remedy for violations of all federal statutes. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 20 (1981). While the Ninth Circuit has not decided the specific issue of whether § 1983

claims are subsumed by Title IX, it has recognized that federal statutes may preclude a § 1983 remedy if they are sufficiently comprehensive. See, e.g., Dittman v. California, 191 F.3d 1020, 1028 (9th Cir. 1999); Dep't of Educ. v. Katherine D., 727 F.2d 809, 820 (9th Cir. 1983). The court agrees with the reasoning of the Second Circuit in Bruneau that, under the Sea Clammers doctrine, Title IX's enforcement scheme is sufficiently comprehensive to subsume plaintiffs' section 1983 claims and demonstrate that Congress intended to preclude § 1983 claims when it enacted this statute. See Bruneau, 163 F.3d at 756-57.

Title IX's administrative enforcement scheme is complex and designed to ensure compliance with its mandates. Id. at 756. Under the enforcement scheme, injured persons can file a complaint with the Department of Education ("DOE"), see 34 C.F.R. § 100.7(b) (1997), and the DOE must then investigate the allegations. Id. § 100.7(c); Bruneau, 163 F.3d at 756. The DOE may also periodically conduct its own compliance reviews without a complaint. Id. § 100.7(a); Bruneau, 163 F.3d at 756. If the DOE concludes that a complaint has merit or discovers violations stemming from its own reviews, the DOE will notify the institution and attempt to reconcile the situation through informal means. Id. § 100.7(d); Bruneau, 163 F.3d at 756. If the DOE is unsuccessful, it may ultimately terminate federal funding to the institution after an administrative hearing. Id. § 100.8; Bruneau, 163 F.3d at 756. As such, Title IX provides a comprehensive administrative remedial scheme.

Further, in addition to the robust administrative remedial scheme, the Supreme Court has held that Title IX provides

individuals with a private cause of action. See Cannon v. Univ. of Chicago, 441 U.S. 677, 709 (1979). "Once in court, the Title IX plaintiff has access to a full panoply of remedies including equitable relief and compensatory damages." Bruneau, 163 F.3d at 756 (citing Franklin, 503 U.S. 60, 73-76 (1992)). The fact that Title IX provides a private remedy in the courts provides further support for Congress' intent to subsume a section 1983 remedy with Title IX.

Therefore, given Title IX's administrative and judicial remedies, the court adopts the rationale of the Second Circuit and finds that it was Congress' intent "that a claimed violation of Title IX be pursued under Title IX and not § 1983." Bruneau, 163 F.3d at 757; see Pfeiffer, 917 F.2d at 789; Travis, 2007 U.S. Dist. LEXIS 11566 at *15-16 (holding that Title VI precludes claims brought pursuant to § 1983 arising from the same facts).

Plaintiffs contend that Title IX does not provide a remedy for constitutional rights and thus, it cannot subsume a claim for violation of their rights to equal protections. In support of their assertion, plaintiffs cite the decisions from the Sixth, Eighth, and Tenth Circuits, which have carved out an exception to the Sea Clammers doctrine for constitutional rights. See Crawford, 109 F.3d at 1284; Seamons, 84 F.3d at 1233; Lillard, 76 F.3d at 722-23. Generally, these Circuits reasoned that although the claims may arise from the same factual basis, the Equal Protection clause gives rise to distinct and independent substantive due process rights separate and apart from those rights protected by Title IX.

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Plaintiffs' argument is unpersuasive. In Sea Clammers, the Supreme Court focused on the available remedies in deciding whether a claim under § 1983 was precluded by a federal statutory scheme. 453 U.S. at 13, 20. The constitutional right exception focuses on the nature of the underlying right, an inquiry not focused upon by the Court in Sea Clammers. Rather, in Smith v. Robinson, the Supreme Court found that the Education of The Handicapped Act ("EHA") provided a sufficiently comprehensive enforcement scheme, such that it demonstrated Congress' intent to preclude a claim under § 1983 for an alleged Equal Protection Clause violation. 468 U.S. 992, 1013[16] ("We conclude, therefore, that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, *based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment*, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.") (emphasis added). Therefore, the court finds that there is not an exception to the Sea Clammers doctrine based upon plaintiffs' assertion of a constitutional right.

Plaintiffs also argue that their § 1983 claim cannot be subsumed by their Title IX claim because their § 1983 claim is pressed against different defendants, the individual defendants, not UCD. Plaintiffs misconstrue the doctrine of preemption. See Boulahanis v. Bd. of Regents, 198 F.3d 633, 640 (7th Cir. 1999).

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[16] Congress subsequently amended the EHA to explicitly provide that the EHA is not the exclusive remedy. 20 U.S.C. § 1415(f). However, this subsequent amendment to statute does not modify the analysis of the Supreme Court and its clear indication that there is not a constitutional exception to the Sea Clammers doctrine.

Through the enactment of Title IX and its remedial scheme, Congress created a regime "for the redress of sex discrimination in athletic opportunities at federally-funded institutions." Id. That regime need not include the ability to press claims against both the institution and the individuals involved. Id. Rather, "[t]he fact that individual claims are not available under Title IX means that Congress has chosen suits against institutions as the means of redressing such wrongs." Id. (citing Sea Clammers, 435 U.S. at 20); see also Waid v. Merrill Area Pub. Sch., 91 F.3d 857, 862 (7th Cir. 1996) ("Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions."); Travis, 2007 U.S. Dist. LEXIS 11566 at *16 ("Allowing Plaintiffs to plead around the detailed statutory scheme created by Title VI by pleading a § 1983 claim against [the defendant] in his individual capacity would be inconsistent with Congress' creation of restrictions on Title VI claims."). As such, plaintiffs' argument that their § 1983 claim is not subsumed by Title IX because it is asserted against the individual defendants, not UCD, is without merit.

Therefore, because plaintiffs' § 1983 claim is subsumed by Title IX, defendant's motion for judgment on the pleadings regarding plaintiffs § 1983 claim is GRANTED.

III. State Law Claims

Finally, defendants argue that plaintiffs' state law claims against them should be dismissed because they are immune from suit. Plaintiffs conceded at oral argument that Eleventh Amendment immunity applies to bar their state law claims against

UCD. The individual defendants contend that they are immune from suit based upon the discretionary immunity accorded public employees pursuant to California Government Code § 820.2.[17]

Section 820.2 provides immunity to a public employee for injuries resulting from "his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." Cal. Gov't Code § 820.2 (West 2007). Generally, "a discretionary act is one which requires the exercise of judgment or choice." Kemmerer v. County of Fresno, 200 Cal. App. 3d 1426, 1437 (1988). However, California courts have not set forth a definitive rule which resolves every case. Id. Rather, the California Supreme Court has adopted an analysis that relies on the "policy considerations relevant to the purpose of granting immunity to the governmental agency whose employees act in discretionary capacities." Id. (internal citations omitted).

> Immunity is reserved for those basic policy decisions which have been expressly committed to coordinate branches of government, and as to which judicial interference would thus be "unseemly." Such areas of quasi-legislative policy-making are sufficiently sensitive to call for judicial abstention from interference that might even in the first instance affect the coordinate body's decision-making process.

Barner v. Leeds, 24 Cal. 4th 676, 685 (2000) (emphasis added). "Immunity applies only to *deliberate and considered* policy decisions in which a conscious balancing of risks and advantages

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[17] Defendants assert numerous arguments in support of their assertion that plaintiffs' state law claims against them should be dismissed. However, as set forth *infra*, because the court finds that discretionary immunity applies to defendants' alleged conduct, the court does not address the merits of those arguments.

took place." Caldwell v. Montoya, 10 Cal. 4th 972, 981 (1995) (internal quotation omitted). As such, the California Supreme Court has drawn a distinction "between the 'planning' and 'operational' levels of decision-making." Johnson v. State, 69 Cal. 2d 782, 795 (1968).

The California Supreme Court has also noted that in order for § 820.2 immunity to apply, a decision by the public employee need not be "a *strictly careful, thorough, formal, or correct* evaluation." Caldwell, 10 Cal. 4th at 983 ("[C]laims of improper evaluation cannot divest a discretionary policy decision of its immunity."). The Caldwell court reasoned that "[s]uch a standard would swallow an immunity designed to protect against claims of carelessness, malice, bad judgment, or abuse of discretion in the formulation of policy." Id. at 983-84.

A fair reading of the complaint reveals allegations that the individual defendants made actual, conscious, and considered collective policy decision. See id. at 984. Plaintiffs allege that "each of the individual defendants has authority over the athletic programs at UC Davis and has participated in the discriminatory actions and decisions" set forth in the complaint. (Compl. ¶ 21). As such, plaintiffs have alleged that the conduct was within the scope of the individual defendants' duties. Plaintiffs also allege that they spoke or tried to speak to various individual defendants regarding reinstatement of women's wrestling, but defendants either refused to change their policies or refused to meet with them. (Compl. ¶¶ 63-64). This allegation reveals that the individual defendants were at least aware and informed of plaintiffs' opposition to their decisions.

Further, plaintiffs allege that each of the individual defendants was "instrumental in the decision to eliminate wrestling participation and scholarship opportunities for female students." (Compl. ¶ 22). As such, plaintiffs have alleged that defendants made actual, conscious decisions relating to the alleged discriminatory conduct.

Moreover, plaintiffs' allegations demonstrate that the alleged discriminatory decisions made by the individual defendants were policy decisions. Plaintiffs allege that the No Females Directive issued by the individual defendants denied "the then-current female wrestlers and all future female wrestlers the many benefits obtained by these female alumni from participating in wrestling at UC Davis." (Compl. ¶ 88). As such, the allegations in the complaint allege that defendants' conduct resulted in a wide-spread effect, not only to the plaintiffs, but also to all future female wrestlers. Plaintiffs' allegations also describe the public response to the individual defendants' decisions. The media supported plaintiffs, writing articles in newspapers and attending the 2001 Student Senate meeting. (Compl. ¶ 70). A member of the California state assembly expressed her concerns about the individual defendants' decision to eliminate women's athletic participation opportunities and threatened to withhold state funding if the decision was not reversed. (Compl. ¶ 71). Thus, it is clear from the face of the complaint that the elimination of a female wrestling program is a "sensitive" issue with "fundamental policy implications." Caldwell, 10 Cal. 4th at 983.

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Plaintiffs contend that the court cannot find that § 820.2 immunity applies to the individual defendants at the pleading stage because the allegations in the complaint do not reveal the process by which defendants made their decision and thus, do not establish a considered decision. However, the Supreme Court of California rejected this argument in Caldwell. 10 Cal. 4th at 983. In Caldwell, the court upheld defendants' demurrer based upon § 820.2 immunity where board members allegedly voted to replace the superintendent based upon improper motives of race and age. Id. at 976. The court held that the complaint need not disclose a "strictly careful, thorough, formal, or correct evaluation." Id. at 983. Rather, the court found that the application of § 820.2 immunity could be decided at the pleading stage where "a fair reading of the complaint" demonstrate that the defendant's conduct "involved an *actual* exercise of discretion." Id. In this case, as set forth above, plaintiffs' allegations demonstrate that the conduct by defendants constituted "actual, conscious, and considered" collective policy decisions. Id. at 984.

Finally, plaintiffs assert that defendants' actions were operational decisions, not policy decisions. In support of this assertion, plaintiffs argue that defendants' actions contravened existing policies established under the California Education Code and Title IX. However, the policies at issue in this case are not those set forth by the legislature, but rather, the policies of the University, as promulgated by the individual defendants. Plaintiffs' complaint alleges that defendants' actions had a wide-spread effect at UCD by eliminating athletic opportunities

for women. Such conduct is not the mere implementation of an already established policy, but the creation of a new, allegedly discriminatory policy. As such, plaintiffs' assertion that alleged conduct of defendants were operational decisions is without merit.

Therefore, because a fair reading of plaintiffs' complaint reveals allegations that the individual defendants made actual, conscious, and considered collective policy decisions, the individual defendants are entitled to immunity pursuant to 820.2. Thus, defendants' motion for judgment on the pleadings regarding plaintiffs' state law claims[18] is GRANTED.

CONCLUSION

For the foregoing reasons, defendants' motion for judgment on the pleadings is GRANTED in part and DENIED in part.

(1) Defendant UCD's motion for judgment on the pleadings regarding plaintiffs' first claim for relief under Title IX based upon a theory unequal treatment is GRANTED.

(2) Defendant UCD's motion for judgment on the pleadings regarding plaintiffs' first claim for relief under Title IX based upon a theory of ineffective accommodation is DENIED.

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[18] The Supreme Court has explicitly found that § 820.2 provides immunity against a public policy tort. Caldwell, 10 Cal. 4th at 984. Moreover, § 820.2 immunity will only fail to apply to basic policy decision where there is a "clear indication of legislative intent that statutory immunity is withheld or withdrawn" in a particular case. The court has found nothing in the Unruh Civil Rights Act which clearly evinces such an intent. See id. at 987-88 (finding that FEHA did not carve out an exception to immunity through the phrase "[e]xcept as otherwise provided by statute").

(3) Defendant UCD's motion for judgment on the pleadings regarding plaintiffs' second claim for relief under Title IX is GRANTED.

(4) Defendant UCD's motion for judgment on the pleadings regarding plaintiffs' third claim for relief for retaliation in violation of Title IX is GRANTED.

(5) Defendant UCD's motion for judgment on the pleadings regarding plaintiffs' claims for punitive damages under Title IX is GRANTED.

(6) Defendant UCD's motion for judgment on the pleadings regarding plaintiffs' claims for emotional distress damages under Title IX is DENIED.

(7) The individual defendants' motion for judgment on the pleadings regarding plaintiffs' claims brought pursuant to 42 U.S.C. § 1983 is GRANTED.

(8) Defendants' motion for judgement on the pleadings regarding plaintiffs' state law claims is GRANTED.

IT IS SO ORDERED.

DATED: October 18, 2007

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE